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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JOHN BORDYNUIK, Inc., a Delaware
corporation,

Plaintiff,

vs.

JB I, INC., a Nevada corporation f/k/a 310
HOLDINGS INC., a Nevada corporation; and
DOES I-V and ROES I-V,

Defendants.

CASE NO. 2:13-cv-01463-APG-VCF
DEPT.

**DEFENDANT JBI, INC.'S MOTION TO
DISMISS AND FOR SUMMARY
JUDGMENT PURSUANT TO FED. R.
CIV. P. 12(b)(6), 12(d) AND 56**

Defendant JBI, INC., a Nevada corporation f/k/a 310 HOLDINGS INC., a Nevada corporation, by and through its attorneys, the law firm of Gordon Silver, hereby moves this Court for dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) and, as the motion includes matters outside the pleadings, for Summary Judgment upon Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 56(c), according to Federal Rule of Civil Procedure 12(d).

This Motion is made and based upon all of the pleadings and papers already on file herein, any and all exhibits, affidavits and/or declarations attached thereto, as well as any and all argument and/or other evidence introduced at any hearing on this matter.

Dated this 30th day of September 2013.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 I.

3 **INTRODUCTION**

4 This case is styled as an action by one corporation against another. In fact, this case is
 5 actually one individual's attempt to pursue personal claims by commandeering a defunct
 6 corporation. The individual, Sandra Elsley, has filed this action because of set-backs experienced
 7 in her pending Canadian action. In that case, filed in June 2012, Ms. Elsley brought individual
 8 claims against John Bordynuik and John Bordynuik, Inc. ("JBI Delaware"), the Plaintiff here.
 9 Recently, that matter has gone badly for Ms. Elsley.

10 In March of this year, an injunction she had obtained *ex parte* in December 2012 was
 11 rescinded by the Ontario court. In its order the court said that Elsley's failure to disclose certain
 12 pertinent facts warranted "immediate rescission" of her injunction, and the court referenced
 13 "other examples of nondisclosure" and material in her affidavit that was "clearly wrong." See
 14 Order of Mr. Justice Robert Nightingale ("Ord."), attached hereto as Exhibit 1, at ¶¶ 54, 57.

15 Perceiving this result as a problem, Ms. Elsley attempted an end-run. She did that by
 16 improperly signing her name on a certificate of renewal and revival as President of JBI Delaware
 17 in order to bring this action on behalf of JBI Delaware. See Certificate of Renewal and Revival
 18 of Charter ("Cert."), attached hereto as Exhibit 2. Of course, Ms. Elsley is simultaneously suing
 19 JBI Delaware in Canada, a conflict in itself, but more problematic is Ms. Elsley's complete lack
 20 of authority to revive JBI Delaware for any purpose, including the purpose of bringing this action
 21 against JBI Nevada. Only a duly elected president of the corporation could do that.

22 John Bordynuik, Ms. Elsley's real target and a defendant in Canada, was the President of
 23 JBI Delaware when it went dormant in 2009. Furthermore, Mr. Bordynuik is still its majority
 24 shareholder. According to Delaware corporate law, only those with authority may renew or
 25 revive a corporation. Ms Elsley has none.

26 On June 25, 2009, Ms. Elsley signed a settlement agreement, which precluded her from
 27 bringing an action against JBI Nevada personally. Ms. Elsley's strategy was to bring the Ontario
 28 action against JBI Delaware and John Bordynuik. Now she has commenced this case. While she

1 purportedly holds shares in JBI Delaware, Ms. Elsley did not bring this action as a derivative suit
 2 on behalf of JBI Delaware. She chose instead to file the action as JBI Delaware, but she has no
 3 standing or authority to proclaim herself President and pursue this case. All of this is simply a
 4 way to avoid further set-backs in the Ontario case, but Ms. Elsley cannot get her way here.

5 This case was improperly filed. JBI Delaware was not properly revived, because the
 6 person claiming to revive it as President is not its president. The exhibits attached hereto,
 7 including the Declaration of John Bordynuik ("Bordynuik Dec."), attached hereto as Exhibit 3,
 8 confirm that fact, and no evidence exists to the contrary. As there is no genuine issue of material
 9 fact that would preclude summary judgment in favor of Defendant JBI Nevada, said Defendant is
 10 entitled to dismissal.

11 II.

12 STATEMENT OF RELEVANT FACTS

13 Sandra Elsley did not add the Defendant company, JBI Nevada, as a defendant in her
 14 action in Ontario, Canada, but the claims are essentially the same. See Amended Statement of
 15 Claim ("S.O.C."), attached hereto as Exhibit 4. Cf. Complaint. There the court initially granted
 16 an ex parte injunction against John Bordynuik transferring his assets. John Bordynuik's assets
 17 include shares in JBI Nevada. That was December 2012. The Ontario court, however, declined to
 18 extend the interim Mareva Injunction on March 1, 2013, in a scathing decision. See Ord., Exh. 1.
 19 For example, the court wrote in paragraph 54:

20 The complete failure to advise Justice Matheson in the Plaintiff's affidavit or in
 21 submissions by her Counsel before him of the written settlement agreement of
 22 June 2009 which both parties agreed would dispose of the Plaintiff's case if it
 23 were held to be binding and valid is, in my view, exactly the type of
 24 nondisclosure that was contemplated by the Court of Appeal in Chitel, supra, that
would result in an immediate rescission of the Mareva Injunction granted at first
instance. This is especially so given the nature of the order obtained which in
effect tied up all assets of the Defendant and not just his shares in the Nevada
company without notice to him.

25 See Ord., Exh. 1, ¶ 54 (emphasis added). The court also stated:

26 What is also most significant is that even though she swore in her affidavit of
 27 January 22, 2013 that she was currently seeking forensic handwriting expertise in
 28 order to verify her signature on that document, it appears that affidavit was false
as her Counsel conceded that neither she nor he had even consulted a forensic
handwriting expert as of the date of the hearing of this motion on February 12.

1 See Ord., Exh. 1, ¶ 33 (emphasis added). The court went on to say:

2 The Plaintiff has not met in my view the heavy onus of establishing she has a
3 prima facie case. The signed June 2009 settlement agreement, if found to be valid
4 and binding, completely disposes of the Plaintiff's action regardless of what the
5 Defendant has done with his shares.

5 See Ord., Exh. 1, ¶ 62 (emphasis added).¹

6 Elsley's goals in the Ontario court include getting to John Bordynuik's assets, and
7 primarily to JBI Nevada. Stymied by the Canadian judge, and lacking credibility there, Ms.
8 Elsley found a different avenue to bring her claim against JBI Nevada less than two weeks later:
9 by falsely signing a revival certificate as the President of JBI Delaware. See Cert., Exh. 2.
10 Unfortunately for her, Ms. Elsley signed a settlement agreement on June 25, 2009, thereby
11 indemnifying John Bordynuik, 310 Holdings ("JBI Nevada"), JBI ("JBI Delaware"), its staff,
12 and its shareholders from any future claims relating to the stock of the company. See Settlement
13 Agreement ("Settlement"), attached hereto as Exhibit 5 at p. 2. Because of that, she could not
14 bring a personal claim against JBI Nevada, Ms. Elsley instead decided to revive JBI Delaware.

15 Ms. Elsley is not, however, an officer of JBI Delaware and did not have authority to
16 renew and revive the company. John Bordynuik was the last President of the corporation before
17 it went dormant. See JBI, Inc. 10-K Form ("10K"), p. 36, attached hereto as Exhibit 6. Even Ms.
18 Elsley has acknowledged in her own Canadian pleadings that John Bordynuik had remained as
19 the sole officer and director of JBI Delaware when it ceased operating in 2009. See S.O.C.,
20 Exh. 4, ¶ 5. John Bordynuik also attests to this in his declaration, filed in support of this motion.
21 See Bordynuik Dec., ¶ 2. While, in theory JBI Delaware could have, even in its dormancy,
22 elected a new board and president at an annual or special shareholder meeting, no meeting
23 consistent with the by-laws occurred. John Bordynuik holds approximately 70% of the shares in
24

25 ¹ Moreover, the court said:

26 In addition, the Plaintiff has adduced no evidence to suggest that if she is successful in her action
27 against the Defendant personally or when added, the Nevada company, her judgment cannot be
28 enforced either here in Ontario or the State of Nevada to collect it.

See Ord., Ex. 1, ¶ 66.

1 JBI Delaware, and no meeting could have taken place without notice to him. According to
 2 Bordynuik's declaration, he received no such notice. See Bordynuik Dec., ¶¶ 1, 4-8.

3 III.

4 LEGAL ARGUMENT

5 A. Legal Standard

6 Dismissal for failure to state a claim upon which relief may be granted can be obtained by
 7 motion under Federal Rule of Civil Procedure 12(b)(6). Under Federal Rule of Civil Procedure
 8 12(d), however, if matters outside the pleadings are presented the motion is treated as one
 9 brought under Federal Rule of Civil Procedure 56. In this case, where dismissal is based upon the
 10 plaintiff corporation's lack of standing because it was not properly revived from dormancy and
 11 its purported president lacks authority to pursue the action, matters outside the pleadings must be
 12 considered and the motion must be treated as a summary judgment motion under Federal Rule
 13 56.

14 Summary judgment is appropriate when, after a review of the pleadings, depositions,
 15 answers to interrogatories, and admissions on file, together with the affidavits, if any, viewed in
 16 a light most favorable to the non-moving party, there remain no issues of material fact and the
 17 moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); Celotex Corp. v.
 18 Catrett, 477 U.S. 317, 317 (1986). Once the party moving for summary judgment has
 19 demonstrated that there is no genuine issue of material fact, the non-moving party must designate
 20 specific facts showing a genuine issue for trial. See Id. at 323-24. This "[e]vidence must be
 21 concrete and cannot rely on 'mere speculation, conjecture, or fantasy.'" Bates v. Clark County,
 22 2006 WL 3308214, at *2 (D. Nev. Nov.13, 2006) (quoting O.S.C. Corp. v. Apple Computer,
 23 Inc., 792 F.2d 1464, 1467 (9th Cir.1986)). Similarly, uncorroborated and self-serving testimony
 24 or declarations, without more, will not create a genuine issue of material fact precluding
 25 summary judgment. See DuBois v. Ass'n Apart. Owners 2987 Kalakaua, 453 F.3d 1175, 1180
 26 (9th Cir.2006), cert. denied, 549 U.S. 1216, 127 S.Ct. 1267, 167 L.Ed.2d 92, 75 USLW 3436
 27 (2007). At the summary judgment stage, the judge's function is not himself to weigh the
 28 evidence and determine the truth of the matter but to determine whether there is a genuine issue

1 for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). Accordingly, conclusory
 2 allegations that are unsupported by factual data cannot defeat a motion for summary judgment.
 3 See Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989).

4 "Summary judgment procedure is properly regarded not as a disfavored procedural
 5 shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to
 6 secure the just, speedy and inexpensive determination of every action.'" Celotex, 447 U.S. at 327.
 7 Courts are likewise admonished to construe and administer available procedural mechanisms "to
 8 secure the just, speedy, and inexpensive determination of an action." See FED. R. CIV. P. 1.
 9 Accordingly, where appropriate, such as in this action, summary judgment should be entered to
 10 secure the just, speedy, and inexpensive determination of an action.

11 In the case, summary judgment is appropriate because Sandra Elsley is not the president
 12 of JBI Delaware. She had no authority to revive the corporation, and it cannot prosecute this
 13 action.

14 **B. Plaintiff Lacks Standing to Bring the Action**

15 Standing is a threshold question that must be resolved before proceeding to the merits.
 16 Los Angeles County Bar Ass'n v. Eu, 979 F.2d 697, 700 (9th Cir.1992). "As a general matter, the
 17 law of the state of incorporation normally determines issues relating to the internal affairs of a
 18 corporation." First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611,
 19 621, 103 S. Ct. 2591, 2597, 77 L. Ed. 2d 46 (1983). See Restatement (Second) of Conflict of
 20 Laws § 302, Comments a & e, (1971). Cf. Cort v. Ash, 422 U.S. 66, 84, 95 S.Ct. 2080, 2090, 45
 21 L.Ed.2d 26 (1975). Because JBI Delaware was incorporated in Delaware, the law of that state
 22 controls. Delaware law states that directors, rather than shareholders, manage business affairs of
 23 corporation. 8 Del.C. § 141(a). Solomon v. Armstrong, 747 A.2d 1098 (1999), aff'd 746 A.2d
 24 277. Because it is undeniable that the determination of whether to sue on behalf of the
 25 corporation is a business affair, that decision is vested with the directors of the corporation.

26 Here, Plaintiff, JBI Delaware, alleges that Defendant, JBI Nevada, breached its contract,
 27 employed fraud to induce it into the contract, and converted its property. See generally
 28 Complaint. Even if the Court were to assume the truth of each and every allegation in Plaintiff's

1 Complaint, however, Plaintiff lacks standing to bring this claim and could not prevail, because it
2 was not properly revived as a corporation and the person behind filing this action is not
3 authorized to pursue it. This action was brought by JBI Delaware and not as a shareholder
4 derivative action, and therefore may only be brought by those with authority to manage the
5 corporation. See generally Complaint. The president and sole director of the corporation, John
6 Bordynuik, did not bring this action. See S.O.C., Exh. 4, ¶ 5.

7 On July 5, 2013, Sandra Elsley filed a certificate of renewal and revival of charter for JBI
8 Delaware, signing her name as President. See Cert., Ex. 2. However, § 312(d)(6) of the
9 Delaware Code requires that all certificates of renewal and revival shall be “filed by authority of
10 those who were directors or members of the governing body of the corporation at the time its
11 certification of incorporation expired or who were elected directors or members of the governing
12 body of the corporation as provided in subsection (h) of this section.” Del. Code Ann. tit. 8,
13 § 312 (West). Additionally, section (h) states that the last acting officers retain authority unless
14 they are unavailable, whereby the stockholders may elect a full board of directors as provided by
15 the bylaws, and the board shall then elect such officers as provided by the law. Id. A special
16 meeting of stockholders may be called by any officer, director, or shareholder upon notice for the
17 purpose of electing directors. Id.

18 John Bordynuik was the only person who could file the revival certificate. John
19 Bordynuik has remained the majority stockholder of JBI Delaware since the company ceased
20 operations, so it is impossible for any other directors, including Ms. Elsley, to have been elected
21 in any capacity without his approval or at least by notice to him of a special meeting. See
22 Bordynuik Dec., ¶¶ 2-4. There is no evidence that John Bordynuik ever resigned from his
23 position as President nor is there any evidence that Ms. Elsley was elected as President of the
24 corporation. The company did not go into dormancy until April 2010, and Ms. Elsley has
25 previously represented to the Canadian court that “John Bordynuik had remained as the sole
26 officer and director” of JBI Delaware when it ceased operating. See S.O.C., Exh. 4, ¶¶ 5 and 97.
27 (“By not providing Elsley with her fair portion of shares of JBI-Nevada as Bordynuik advised
28 her he would, Bordynuik was not acting within the parameters of his obligations as a director of

1 either JBI-Nevada and JBI-Delaware.”) Because Ms. Elsley is not bringing this action as a
2 derivative suit—because John Bordynuik is the only person with authority to bring the case on
3 behalf of the corporation and he has not done so—and because Ms. Elsley did not have the
4 authority to file the certificate of revival and renewal of the corporation, which is void for lack of
5 authority, this action cannot move forward and summary judgment must be granted.

6 **IV.**

7 **CONCLUSION**

8 Ms. Elsley was not satisfied in the direction her case was headed in Ontario when Justice
9 Nightingale exposed her nondisclosures and wrongdoings and because she was precluded from
10 bringing this action, so she attempted for a fresh start by bringing essentially the same claims
11 through JBI Delaware in this court. However, she lacks standing to do so. Ms. Elsley had no
12 authority under Delaware law to renew and revive the company. Nevertheless, she improperly
13 signed her name as President of JBI Delaware in order to renew and revive the company and
14 then brought this action against JBI Nevada.

15 As President, John Bordynuik is the only person who could bring this action on behalf of
16 JBI Delaware. Even if there was a special meeting to elect new directors, only Bordynuik could
17 call the meeting. Even if a special meeting was somehow held, Bordynuik did not receive
18 notice. Therefore, there is no possible legal avenue by which Ms. Elsley would have become
19 President of JBI Delaware and the company was not properly renewed and revived. It cannot
20 bring this action.

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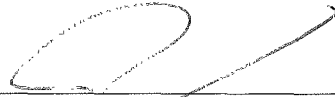
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28 ///

1 For these reasons, no genuine issue of material fact is present to challenge JBI Nevada's
2 entitlement to judgment. JBI Nevada therefore respectfully asks that this Court GRANT relief
3 in favor of JBI Nevada pursuant to Federal Rules of Civil Procedure 12(b)(6), 12(d), and 56.

4 DATED this 30th day of September 2013.

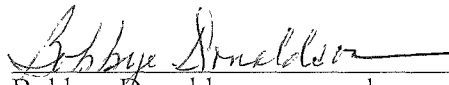
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14 **CERTIFICATE OF SERVICE**

15 The undersigned, an employee of Gordon Silver, hereby certifies that on the 30th day of
16 September 2013 she served a copy of the DEFENDANT JBI, INC.'S MOTION FOR
17 SUMMARY JUDGMENT, via the Court's CM/ECF electronic filing to:

18 John R. McMillan, Esq.
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